(16)

No. 474

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Supreme Court of the United States.

OCTOBER TERM, 1942.

HELEN SEARS BRADLEY ET AL.,
Petitioners,

v.

WILLIAM M. WELCH, FORMER COLLECTOR,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT AND BRIEF IN SUPPORT THEREOF.

FREDERICK H. NASH,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

The undersigned, on behalf of the above-named petitioners, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the First Circuit entered on July 24, 1942, in the case between the parties docketed therein as No. 3772.

Opinions Below.

The opinion of the United States District Court for the District of Massachusetts (R. 87-100) is reported in 37 F.S. 788. The opinion of the Circuit Court of Appeals (R. 157-169) is reported in 130 F. (2d) 109.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered July 24, 1942 (R. 169).

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

The Question Presented

This case involves the proper rate of depreciation upon business real estate held by a family real estate trust, under which a mother and daughter enjoyed respectively two-thirds and one-third of the net income. Prior to 1920 they had owned the property as tenants in common in the above proportions. Under the trust they became equitable owners in the same proportions. The Commissioner contended and the court held that if this was a revocable trust under Section 166 of the Revenue Acts of 1932 and 1934 the basis of depreciation was the value of the buildings on March 1, 1913, plus the cost of improvements between 1913 and 1920. It is undisputed that unless it was a revocable trust under Section 166 the basis of depreciation was the fair market value of the buildings on December 31, 1920, the date of acquisition by the trust. We do not press our contention below that if Section 166 governed the Commissioner applied the wrong basis of depreciation. That is a question of no public importance. But we petition on the ground that the trust was not a "revocable trust" under Section 166. Upon this point the court's decision is of great moment and public importance, for it is opposed to the clear distinction, always recognized by this Court, and by every other court, between a trust which may be revoked by the grantor alone or with the consent of a compliant person, and a trust which stands unless terminated by

agreement among the persons who before the trust was formed were the real owners of the trust property.

Upon this exact point there is no conflict among the Circuits, for the point never arose before. The decision is unique and is due to the court's misconception of the meaning of the recent opinions of this Court of which *Helvering* v. *Clifford,* 309 U.S. 331, is an example. It would result from the decision, if followed, that every family real estate trust where the members of the family were not "at loggerheads" (Magruder, J.), though irrevocable except by joint action of the beneficial owners, would be a revocable trust within the meaning of Section 166, unless each beneficial owner has a "substantial pecuniary motive" (Magruder, J.) for opposing revocation.

Our point is that Section 166 applies to a trust set up by "*the* grantor", who reserves power to take back the property in whole or in part by assent of a person not having a substantial adverse interest, but that it does not apply to a genuine trust created by joint owners of property, whether they are mutually agreeable members of a family or not, and whether the pecuniary interest of one is substantial or not. The latter situation does not call for a "realistic appraisal" (Magruder, J.). Each beneficiary of such a trust has an absolute right to refuse to become again a tenant in common of the property whether or not he can point to any special advantage to himself from the trust rather than from a tenancy in common.

Section 166 follows:

> "SEC. 166. REVOCABLE TRUSTS.
>
> Where at any time . . . the power to revest in the grantor title to any part of the corpus of the trust is vested—
>
> (1) in the grantor, either alone or in conjunction with any person not having a substantial adverse in-

terest in the disposition of such part of the corpus or the income therefrom, or

(2) in any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom,

then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor."

The trust could be terminated or modified during the joint lives of the two beneficiaries upon their joint written request to the trustee. After the death of either the trust could be terminated or modified by the written request of the survivor.

The trust was in existence during the years involved, 1932 to 1935. The mother died on September 26, 1935.

Specification of Errors.

The Circuit Court of Appeals erred in holding that the trust was a revocable trust within the meaning of Section 166 of the Revenue Acts of 1932 and 1934.

Reasons for Granting the Writ.

The court failed to distinguish between a trust created to route a grantor's income among his family, and which is substantially revocable at his pleasure, and a genuine trust created by owners of property. The court employed a wrong test to decide whether the former tenants in common or owners in severalty possessed substantially adverse interests to each other. The court misapplied to the latter sort of trust the criteria established by this Court for the former sort of trust.

Section 166 is directed solely against avoidance of income tax. It is not intended to declare revocable every family trust where the beneficial owners are agreeably disposed to each other and where they cannot point to a specific pecuniary advantage from the continued existence of the trust.

Wherefore, it is respectfully submitted that the petition should be granted.

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